IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 522

BALFOUR, GUTHRIE & CO., LTD., and
COMMONWEALTH AFRICAN, LTD.,
Petitioners,

against

Steamship "ZAREMBO," her engines, etc., AMERICAN-WEST AFRICAN LINE, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

D. ROGER ENGLAR,
MARTIN DETELS,
EZRA G. BENEDICT FOX,
Proctors for Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Balfour, Guthrie & Co., Ltd., and Commonwealth African, Ltd., for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, respectfully shows:

Statement of the Matter Involved

Petitioners are owners of cocoa beans seriously damaged while being carried by respondent, a common carrier, from West Africa to New York in January, 1940, as part of the cargo aboard the steamship "Zarembo." Petitioners filed a libel in admiralty for cargo damage in the United States District Court for the Eastern District of

New York and respondent filed an answer claiming exemption from liability under a Federal statute enacted in 1936, namely the United States Carriage of Goods by Sea Act (46 U. S. Code, Secs. 1300-1315) (R. 21-23). The pertinent parts of this statute are printed in Appendix A, pages 23-25.

The Circuit Court of Appeals affirmed the judgment of the District Court in favor of the shipowner (R. 1342) and on September 29, 1943, denied a petition for rehearing (R. 1350).

Jurisdiction

The jurisdiction of this Court over this case is based on Section 240 of the Judicial Code (28 U. S. Code, Sec. 347) and Article III, Section 2, of the Constitution.

The Facts

The "Zarembo" was unseaworthy at the time she sailed (R. 1296, 1343). This unseaworthiness was not a mere minor defect. On the contrary it was a serious wastage in the outer plating of the hull which threatened the safety of the ship and the lives of all on board,—as shown by the fact that when the unseaworthy plate cracked in two different places and admitted large quantities of seawater through cracks several feet long (R. 112, 159), the Master, after consultation with his officers, put back to Bermuda as a port of refuge (R. 43).

The "Zarembo" was then 20 years old (R. 1273) and her outside hull plating where it subsequently cracked was worn so thin that less than 25% of its original thickness remained. In other words, there was a wastage of 75%, which is three times the maximum ordinarily considered safe (R. 1343). The worn plate finally failed in two places (R. 1287) "in the centers of well defined grooves, both on the inside and outside of the ship" (R. 1295), and seawater poured into the No. 1 hold where it damaged petitioners' cargo.

The wastage of the plate was a gradual process, which occurred over a period of years (R. 232, 260, 273, 354).

More than a year before the failure of the plate involved in the present suit, one of the adjoining plates had been condemned on a regular survey because it was "commencing to show signs of considerable wastage" (R. 983). However, the American Bureau surveyor agreed to pass the plate "until the next drydocking" in consideration of the owner's promise to renew the plate at that time (R. 989). This promise was not kept and there is no suggestion in the evidence that the area around this condemned plate was given any special inspection. It is particularly noteworthy that the cargo battens over these plates were not removed when the vessel was inspected prior to the voyage on which the failure occurred (R. 274). The importance of this circumstance is clearly evident from an inspection of the photograph (Libellants' Trial Exhibit 27) reproduced in the Appendix C (p. 27) hereof, which shows the impossibility of making any detailed examination with these battens in place.

Nevertheless, the Courts below held that the shipowner should be exculpated from liability for the seawater damage under the construction which they placed upon the United States Carriage of Goods by Sea Act (46 U. S. Code, Sec. 1304, printed in Appendix A, at p. 24) with respect to the degree of diligence demanded of the shipowner.

In the majority opinion of the Circuit Court of Appeals, it is stated that during two surveys before the voyage "the plating was hammer tested, inside and out, by at least one surveyor" (R. 1343). This statement, however, refers to the hull plating, generally. It is not intended as a statement that anyone hammer tested *the defective plate.* It is based upon the testimony of two of the shipowner's witnesses who said that they went around with a hammer and tapped some of the plates (R. 243, 255, 266, 267). There is no evidence in the record that a surveyor or anyone else ever applied a hammer test to the worn plate which failed. This worn plate was quite large, being 18½ feet

by 5½ feet (R. 112)—as wide as one man standing up and as long as three men lying down. This plate, known as the G-2 plate, was one of the hull plates on the outside of the vessel toward the bow in precisely the place peculiarly subject to panting stresses due to bending of the plate about the axes formed by the longitudinal frames as the vessel plunges into head seas. "Panting" is a phenomenon well known to marine surveyors and is caused by the alternate application and release of pressure upon the hull plates where the bow breasts the waves (R. 152, 153, 182, 198).

The *outside of this worn and corroded plate* formed part of the outside of the vessel and was in full view not only when the vessel was on drydock but also while afloat excepting only when she was loaded deeper than the 8½ foot draft mark. It was not under water on the outward voyage (R. 935). The two grooves where the plate finally cracked were both above water at all times when the "Zarembo" was drawing not more than 10½ feet, one being at about the 10 foot 8 inch draft and the other at about the 13 foot 1½ inch draft mark (R. 157). The two cracks in the grooves where the plate had wasted away were two and three feet long (R. 112, 159), but the grooves themselves extended for some distance beyond the cracks at both ends (R. 160, 163, 201, 940). The *inside of the plate* formed part of the walls of the No. 1 hold and would have been completely visible whenever that hold was free of cargo but for the fact that it was half covered by cargo battens (Exhibit 27, reproduced in Appendix C (p. 27) hereof) which were not removed even for the much vaunted four-year special survey just before the voyage in question (R. 263, 274).

This, therefore, was not a case of overlooking a single small defective rivet among the many thousands of rivets in a ship, or of failing to find a latent defect in some small pipe or fitting hidden within the hull. It was the gradual grooving and wearing thin by corrosion and panting over a long period of time of one of the big hull plates which

form the outside shell of the vessel, above the light load line, in two long grooves to a depth of more than three-fourths of the thickness of the plate.

The Decision of the Circuit Court of Appeals

Both the District and Circuit Courts unanimously and concurrently found: (1) that the ship was unseaworthy at the time she sailed (R. 1296, 1343); (2) that this unseaworthiness consisted in her 20 year old plating being worn thin far beyond (more than three times) the maximum wear considered safe (R. 1296, 1343); (3) that the plate cracked in the two very places where it was so worn (R. 1295, 1343); and (4) that the water which damaged petitioners' cargo entered the hold through these two cracks (R. 1295, 1342). Nevertheless, the Courts below held that the shipowner had shown sufficient diligence to relieve himself of liability under the Federal statute. There being no conflict of evidence as to what was done by any of the witnesses whose testimony is relied on to establish such diligence, this raises a pure question of law, namely as to whether the statutory standard of diligence has been met by the shipowner's proof. The statute itself expressly provides that the shipowner has the burden of proof on this issue (46 U. S. Code, Sec. 1304, printed in Appendix A, at p. 24), and this was specifically found by the district judge (R. 1296—Third Conclusion of Law). It is quite clear from the majority opinion of the Circuit Court of Appeals that their conclusion that the shipowner had exercised due diligence rested upon the fact that the vessel had gone through two surveys, that *some* of the plating (but not the big worn plate which cracked in two places) was hammer-tested, and that "numerous visual examinations" were made.

We assume that no one will seriously contend that a competent and diligent surveyor cannot by a proper examination ascertain the unseaworthy condition of a large steel hull plate which has wasted away, in two grooves several

feet long on both the outside and the inside of the plate, to a fourth of its original thickness.

Accordingly, the decision of the Circuit Court of Appeals can be explained only on one of two theories:

1. That the statutory requirement of due diligence is satisfied by employing reputable surveyors and the customary crew. This Court clearly and emphatically rejected such a construction of the statutory requirement of due diligence under Section 3 of the Harter Act (a statute enacted in 1893, the pertinent parts of which are printed in Appendix B, pp. 25-26) in *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.*, 181 U. S. 218, 225, 226, when it held in no uncertain terms that the duty of due diligence cannot be delegated, and that the shipowner is bound by the negligence of the particular individual who actually made the examination or inspection.

2. The only other theory upon which the decision of the Courts below can be explained without violating the views expressed by this Court in *International Navigation Co.* v. *Farr & Bailey*, is that the surveyors and others exercised due diligence by merely looking at this plate and hammer testing a few others. It is submitted, however, that the holding below cannot be justified on this ground, in view of the following facts stated in the majority opinion of the Circuit Court of Appeals, namely (1) that so much corrosion had previously been found on the plate adjacent to the one which cracked that its renewal had been recommended by a surveyor in January 1939, a year before (R. 1343), and (2) that the American Bureau of Shipping had warned all its surveyors more than two years before the voyage in question that longitudinally framed ships like the "Zarembo" should be watched for grooving and corrosion (R. 1343). Moreover, it is obvious that even a visual inspection would have much less than its usual value unless the battens were removed (Exhibit 27—reproduced in Appendix C, p. 27).

Questions Involved

The sole questions at issue therefore, are:

I. Does the Carriage of Goods by Sea Act permit shipowners to relieve themselves of liability for damage arising from failure to furnish a seaworthy vessel merely by employing reputable surveyors?

II. Is the Carriage of Goods by Sea Act requirement of due diligence satisfied by any inspection or test which does not disclose dangerous unseaworthiness due to the gradual wasting away of the outside shell plating of a vessel over a period of years, to the point where the plates are reduced to less than a fourth of their original thickness and less than a third of the thickness commonly accepted as the minimum for safety?

Reasons for Granting the Writ

1. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

This case involves a question of law of general commercial importance, namely the construction of a federal statute enacted by Congress in 1936 and which has never been construed by this Court. This statute, the Carriage of Goods by Sea Act, determines and controls the rights and liabilities of all shipowners, ship operators and merchants, importers and exporters, shippers, consignees, banks and other holders of bills of lading evidencing a contract for the carriage of goods by sea in foreign trade either to or from United States ports (U. S. Code, Sec. 1300, printed in Appendix A, at p. 23). The liability of shipowners engaged in foreign trade, to or from our ports, for loss of or damage to cargo arising from failure to furnish a seaworthy ship, concerns not only the parties involved in

this particular controversy but all shippers, consignees and owners of cargo carried to or from United States ports and banks and other holders in due course of negotiable bills of lading purchased in reliance upon this statute which by its terms specifically places upon shipowners a duty to exercise due diligence to make the ship seaworthy and fit and safe for the carriage and preservation of the cargo covered by the bills of lading issued by the shipowner under this statute (46 U. S. Code, Sec. 1303 (1)).

The Carriage of Goods by Sea Act is not peculiar to the United States. It is the enactment of an international sea code which merchants found necessary to protect themselves from an endless variety of bills of lading full of fine print designed to relieve the shipowner of liability for loss or damage to the cargo resulting even from failure to furnish a seaworthy ship. After many years of agitation, the Maritime Law Committee of the International Law Association, in consultation with representatives of various interests, drew up in 1921 what were known as the Hague Rules which were issued for the consideration of the commercial public. The following year the delegates at the Diplomatic International Conference on Maritime Law in Brussels unanimously recommended the adoption of a draft Convention which in effect embodied the Hague Rules, as the basis of a Convention between the participating States, and contemplated that each State would, when the Convention became effective, give the rule statutory force with respect to all outward bills of lading. *Temperley's Carriage of Goods by Sea Act, 1924,* 4th Edition, pages 3-4. The Hague Rules were enacted into law by Australia and England in 1924, and by Canada and the United States of America in 1936, and have by now been given statutory force by most of the nations, protectorates, colonies, etc. of the British Commonwealth of nations. *Scrutton on Charterparties and Bills of Lading,* 14th Ed., pages 569-77. The American Act giving statutory effect to these Rules applies to contracts of carriage both to as well as from United States ports in foreign trade (46 U. S. Code, Sec. 1300).

2. The decision of the Circuit Court of Appeals conflicts with the decisions of other Circuit Courts of Appeals on the same matter:

The inevitable inference to be drawn from the opinion of the Circuit Court of Appeals for the Second Circuit is that a shipowner discharges his duty of due diligence by employing reputable surveyors to make periodic examinations irrespective of whether the surveyors themselves exercise due diligence. In other words, the Circuit Court of Appeals for the Second Circuit held that a shipowner can delegate the duty of due diligence to make the ship seaworthy. Not only is this in clear conflict with the decision of this Court in *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.*, 181 U. S. 218, 225, 226, but it also conflicts with the following decisions of other Circuit Courts of Appeals which, following the views expressed by this Court, decided that the duty of due diligence is nondelegable.

FOURTH CIRCUIT

The Maria, 91 F. (2d) 819, 824;
The Pinellas, 45 F. (2d) 174, 177;
Nord Deutscher Lloyd v. *Insurance Company of North America*, 110 Fed. 420, 427.

FIFTH CIRCUIT

The Framlington Court, 69 F. (2d) 300, 307;
The Leerdam, 17 F. (2d) 586, 587.

NINTH CIRCUIT

Bethlehem Shipbuilding Corporation v. *Gutradt Co.*, 10 F. (2d) 769, 771;
The Feltre, 30 F. (2d) 62, 64.

The foregoing cases were decided under the Harter Act (46 U. S. Code, Sec. 192), whereas the present decision of the Circuit Court of Appeals for the Second Circuit is based

upon the Carriage of Goods by Sea Act. However, the Carriage of Goods by Sea Act was itself based upon the Hague Rules (1923 A. M. C. 63) which in turn were based on the Harter Act, and it has been held both in this country and in the English courts, including the House of Lords, that where the same language is used, it will be given the same construction in the later Acts that was placed upon it in the Harter Act.

Spencer Kellogg & Sons v. *Great Lakes Transit Corporation,* 32 F. Supp. 520;
Gosse Millerd, Ltd. v. *Canadian Government Merchant Marine,* (1929) A. C. 223;
Hourani v. *T. & J. Harrison,* 32 Com. Cas. 305 (C. A.).

Incidentally, in the *Spencer Kellogg* case, *supra,* Judge TUTTLE in the Eastern District of Michigan applied the doctrine of the *International Navig. Co.* v. *Farr & Bailey Mfg. Co., supra,* to the Carriage of Goods by Sea Act (p. 530 of 32 F. Supp.).

The District Court in the present case rendered lip service to the law as laid down by this Court in *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.,* 181 U. S. 218, 225, 226, from which he quoted in his opinion, stating that the obligation of the shipowner to use due diligence to make the vessel seaworthy under the Carriage of Goods by Sea Act is the same as under the Harter Act and that the duty of the carrier to use due diligence is not satisfied by delegating that duty to a third person (R. 1274). The Circuit Court of Appeals, however, although the controlling authority of *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.* was quoted from in appellants' brief and cited again in appellants' reply brief, and the Court's attention was specifically directed to it in the petition for rehearing in which it was the only case mentioned (R. 1349), appears to have ignored or disregarded the case completely, for it is not even mentioned in their opinions.

3. The Circuit Court of Appeals has decided a question of federal law contrary to the principles laid down by this Court.

The Circuit Court of Appeals for the Second Circuit has in effect held that the shipowner may delegate to surveyors the duty of due diligence to make his ship seaworthy which is imposed upon shipowners by the Carriage of Goods by Sea Act.

In *International Navigation Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218, 225, 226, this Court held that the duty of due diligence under the Harter Act cannot be delegated. The pertinent provisions of the Harter Act with respect to due diligence are similar to the corresponding provisions of the Carriage of Goods by Sea Act, which is based upon it, as will readily appear by comparison of the texts set forth in Appendix A (pp. 23-25) and B (pp. 25-26).

WHEREFORE, petitioners pray that this Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit directing it to send to this Court for review, a full transcript of the record in the said Circuit Court of Appeals in the case entitled on its Docket No. 298, October Term 1942, *Balfour, Guthrie & Co., Ltd. and Commonwealth African, Ltd., Libellants-Appellants,* v. *American-West African Line, Inc., Claimant-Appellee;* and that the decree of the United States Circuit Court of Appeals for the Second Circuit dated September 29, 1943 be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as may be just.

Dated: New York, November 30, 1943.

BALFOUR, GUTHRIE & CO., LTD., and
COMMONWEALTH AFRICAN, LTD.,
Petitioners,

By D. ROGER ENGLAR,
MARTIN DETELS,
EZRA G. BENEDICT FOX,
Proctors for Petitioners.